No. 18-485

IN THE

Supreme Court of the United States

EDWARD G. MCDONOUGH,

Petitioner,

v.

YOUEL SMITH, INDIVIDUALLY AND AS SPECIAL DISTRICT ATTORNEY FOR THE COUNTY OF RENSSELAER, NEW YORK, AKA TREY SMITH,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF CRIMINAL DEFENSE ORGANIZATIONS, CIVIL RIGHTS ORGANIZATIONS, AND THE CATO INSTITUTE AS AMICI CURIAE SUPPORTING PETITIONER

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INTEREST OF *AMICI CURIAE**

Amici curiae Brooklyn Defender Services, The Legal Aid Society, New York County Defender Services, Neighborhood Defender Service of Harlem, Center for Appellate Litigation, Appellate Advocates, Vermont's Office of the Defender General, and the New York State Association of Criminal Defense Lawyers provide criminal defense and related representation in the Second Circuit to the individuals that will be directly impacted by the decision below—innocent people prosecuted for crimes based on fabricated evidence. They are joined by fellow *amici curiae* the Cato Institute, National Association of Criminal Defense Lawyers (NACDL), National Police Accountability Project (NPAP), Southern Poverty Law Center (SPLC), Association of Criminal Defense Lawyers of New Jersey, California Attorneys for Criminal Justice, and New Mexico Criminal Defense Lawyers Association—leading criminal defense and civil rights organizations outside of the Second Circuit that defend civil liberties, the rights of persons accused of crimes, and the interests of wrongfully convicted persons in asserting their constitutional rights.

Amici share the same fundamental concern with the rule announced by the court below: It imposes an

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* Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than *amici curiae* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented in writing to the filing of this brief.

unfair and unworkable burden on individuals exercising fundamental rights, has enormous consequences for the orderly administration of justice, and is divorced from the realities of criminal litigation. This Court should definitively establish that the limitations period for § 1983 fabrication-of-evidence claims does not begin to run until the termination of criminal proceedings and thereby restore uniformity to federal law.

INTRODUCTION AND SUMMARY OF ARGUMENT

The statute of limitations for a claim for the unlawful fabrication of evidence under 42 U.S.C. § 1983 should not begin to run until after a criminal prosecution concludes. That rule flows directly from this Court's holding in *Heck v. Humphrey*, 512 U.S. 477 (1994), which held that claims analogous to evidence-fabrication claims should be brought after the termination of criminal proceedings. It also conforms to the Court's broader pronouncements about the appropriate relationship between federal civil and state criminal litigation. This Court has consistently held that federal civil litigation should come after the conclusion of state criminal proceedings, both to respect the prerogative of states to adjudicate alleged violations of state law and to bolster the strong judicial policy against inconsistent adjudications in parallel proceedings.

A bright-line rule that fabrication-of-evidence claims accrue only after the termination of criminal proceedings is also far more administrable than the rule announced below. The decision below held that the statute of limitations for unlawful fabrication of evidence under 42 U.S.C. § 1983 begins running when the individual "learned of the fabrication of the

evidence and its use against him in criminal proceedings," and "was deprived of a liberty interest by," for example, an arrest or trial. *McDonough v. Smith*, 898 F.3d 259, 267 (2d Cir. 2018). That rule is confusing and almost impossible to administer. No one knows what it means for a criminal defendant to have "learned of the fabrication of the evidence and its use against him in criminal proceedings." It is unclear, for example, whether attempting to impeach a witness, questioning evidence's chain of custody, moving to suppress tainted evidence, or suggesting that the prosecution's case just doesn't add up would constitute sufficient "knowledge" to start the statute of limitations running. Accrual rules should be clear. The Second Circuit's rule is anything but.

Moreover, any pre-termination accrual rule, such as the rule announced below, risks forcing criminal defendants to mount § 1983 suits—and prosecutors and officers to defend against them—either during a pending criminal trial or while still pursuing its appeal. The Court should view any rule that would require criminal defendants to bring civil suits demanding remedy for actions directly related to pending criminal cases during the pendency of the criminal proceedings with deepest suspicion.

Such an accrues-during-prosecution rule would ignore the practical realities of criminal defense and civil rights litigation. It would force an innocent defendant to make a Hobson's Choice. He could remain silent and hold the state to its fabricated proof—as is his absolute constitutional right—but in doing so risk losing his civil claim. Or he could demand a remedy for the fabrication—as is also his absolute constitutional right—but in doing so add a confusing, potentially prejudicial element to the criminal pro-

ceedings. A criminal defense lawyer would not advise a client to bring a parallel civil rights claim during his criminal proceedings that could jeopardize rights that are constitutionally guaranteed to criminal defendants, such as the right to hold the prosecution to their burden of proof beyond a reasonable doubt, and to present testimony only after the prosecution's case is submitted, or not at all. And prosecutors facing civil suits alleging misconduct by their offices (or by other law enforcement officers with whom they work regularly) would be less likely to dismiss weak cases and more likely to pursue convictions, if only to protect law enforcement officials—and the jurisdictions that elected them—against the civil suit.

The § 1983 suit itself would also prejudice the criminal defendant. Allegations in the civil complaint would require the defendant to divulge all the facts and details known to him before the prosecution presents its case and carries its burden and would unleash the broad rules of civil discovery, thereby critically imperiling the defendant's absolute right to remain silent during the criminal proceeding and require the state to prove its case beyond a reasonable doubt.

An accrues-during-prosecution rule would also have crushing practical consequences. Knowing use of fabricated evidence to bring about the conviction of a criminal defendant is among the most serious misconduct anyone in the criminal justice system can commit. It is also a disturbingly common cause of wrongful convictions. Statistics, anecdotes, cases, and *amici*'s own experience show just how widespread the problem of evidence fabrication is. A rule that would force defendants to sue during the pending criminal proceedings would mean that a devas-

tating number of meritorious fabrication-of-evidence claims will never see the light of day. In the Second Circuit alone, countless criminal defendants, along with *amici* who defend and fight for them, would suffer from the fallout of such a rule.

ARGUMENT

I. An Accrual Rule that Turns on the "Awareness of the Evidence and Its Improper Use" Is Confusing and Unworkable

A. The Rule Fails to Provide Clear Guidance to Plaintiffs and Is Unworkable

The Second Circuit applied "standard accrual rules" to hold that a fabrication-of-evidence claim accrues when a plaintiff becomes "aware of th[e] tainted evidence and its improper use." *McDonough*, 898 F.3d at 266-67. As petitioner explains, the court's application of the "standard" rules was not just wrong on its own terms—the court should not have applied them at all. Pet. Br. 19-30. This Court has cautioned that practical considerations may render standard accrual rules inappropriate for certain claims. *See Wallace v. Kato*, 549 U.S. 384, 388-89 (2007) (noting, for instance, the "distinctive rule" for false imprisonment claims given "the reality that the victim may not be able to sue while he is still imprisoned"). That is particularly true here, where the Second Circuit adopted an accrual rule that is confusing and unworkable in the real world.

The Second Circuit's "awareness rule" fails to provide meaningful guidance on when a fabrication claim actually accrues in most criminal cases. Criminal defendants are often "aware of th[e] tainted evidence" as soon as it is used against them, *McDonough*, 898 F.3d at 267, but may not know

whether the tainted evidence was deliberately fabricated by a government official until much later. The degree of "awareness" required under the accrual rule adopted below is unclear. Many plaintiffs will respond to this uncertainty by filing fabrication claims prematurely, with insufficient information, to avoid their claims being time-barred. And in so doing they heighten the risk that their otherwise meritorious claims will be dismissed.

This concern is especially salient for one of the most pervasive forms of fabricated evidence: false testimony. *See generally* Anne Bowen Poulin, *Convictions Based on Lies: Defining Due Process Protection*, 116 Penn St. L. Rev. 331 (2011); Joseph Goldstein, *"Testilying" by Police: A Stubborn Problem*, N.Y. Times (Mar. 18, 2018), http://perma.cc/KUC9-XCMU. A criminal defendant may know right away that a witness' account tying him to the scene of the crime is false. But false testimony is not always the product of bad faith by law enforcement officials. *See* Poulin, *supra*, at 346-48. Often times it is the witness who has lied—or simply misremembered. *See id.*; *Smalls v. City of New York*, 181 F. Supp. 3d 178, 186-87 (E.D.N.Y. 2016). An accrual rule that turns on awareness of tainted evidence fails to account for these nuances, and will compel confused plaintiffs to file evidence-fabrication claims based on incomplete information.

Additionally, to the extent the rule adopted below starts the clock before plaintiffs even know the identity of the fabricator, it is simply unworkable. *See McDonough*, 898 F.3d at 267 (suggesting that McDonough's evidence fabrication claim accrued as soon as he was "indicted and arrested"). A substantial amount of time often passes before a defendant

realizes that tainted evidence was fabricated by a government official[1]—an amount that can easily exceed the time allowed by the applicable statute of limitations. While courts may theoretically toll the statute of limitations on an equitable basis, this Court has long understood that "[e]quitable tolling is a rare remedy to be applied in unusual circumstances, not a cure-all for an entirely common state of affairs." *Wallace*, 549 U.S. at 396.

In a recent § 1983 evidence fabrication suit, for example, more than a decade elapsed before plaintiffs learned the identity of the fabricator. *See Serrano v. Guevara*, 315 F. Supp. 3d 1026, 1032-33 (N.D. Ill. 2018). *Serrano* involved two detectives who were unable to solve a murder and "decided to frame three Latino men with histories of armed robberies to close the case." *Id.* at 1032. The detectives did so by using physical coercion to suborn false testimony from a recent arrestee suffering from the effects of heroin withdrawal. *Id.* The arrestee proceeded to falsely testify that he encountered the plaintiffs carrying a weapon on the day of the murder and that they had admitted to the crime. *Id.*; *see People v. Serrano*, 55 N.E.3d 285, 289 (Ill. App. Ct. 2016). The plaintiffs, who had nothing to do with the murder, would have known that the testimony was false as soon as it was introduced. But they did not learn that government

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[1] This is especially true in jurisdictions like New York, where restrictive criminal discovery laws allow prosecutors to withhold almost every piece of relevant evidence they intend to use at trial—including police reports, witness statements, and other documents—until a suppression hearing is conducted or a jury sworn. *See* N.Y. Crim. Proc. Law §§ 240.44, .45.

officials were involved in the fabrication until the witness recanted eleven years later during post-conviction proceedings. *See Serrano*, 315 F. Supp. 3d at 1033.

The confusion caused by the awareness rule does not end with concerns over the degree of actual knowledge required to start the clock. Under the rule adopted below, an evidence fabrication claim also accrues when a plaintiff *should have known* of the improper use of tainted evidence. *McDonough*, 898 F.3d at 264, 266. "In determining what a plaintiff should have known, [courts] ask what facts a reasonably diligent plaintiff would have discovered." *Gabelli v. SEC*, 568 U.S. 442, 452 (2013) (internal quotation omitted). But it is unclear what investigatory efforts can be expected of a "reasonably diligent plaintiff" who is also a defendant in an active criminal proceeding—particularly in states with especially restrictive criminal discovery laws, like New York. The rule adopted below provides no guidance to plaintiffs, and the very question belies the rule's logic: It is not reasonable to expect a plaintiff to investigate facts that would form the basis of a fabrication claim while simultaneously defending against a criminal prosecution that follows from the fabrication. *See infra* Part II. The Court should thus reject any rule under which a fabrication claim accrues prior to the termination of criminal proceedings.

B. The Awareness Rule is Inconsistent with Most Other Accrual Rules for Claims Stemming from Prosecutorial Misconduct and Will Encourage Piecemeal Litigation

The Second Circuit's "awareness rule" for evidence fabrication claims is plainly at odds with accrual rules for other § 1983 claims that involve mis-

conduct by law enforcement officials during criminal proceedings. Such claims generally do not accrue until after criminal proceedings have terminated, regardless of when a plaintiff knows or should have known of the existence of a cause of action.

For example, § 1983 claims alleging that a prosecutor has withheld exculpatory evidence from the defendant, *see Brady v. Maryland*, 373 U.S. 83 (1963), accrue only after the termination of criminal proceedings. *See Poventud v. City of New York*, 750 F.3d 121, 132-34 (2d Cir. 2014) (en banc); *Owens v. Baltimore City State's Attorneys Office*, 767 F.3d 379, 390 (4th Cir. 2014). The same is true of § 1983 claims alleging that the state failed to disclose evidence that might impeach the credibility of the state's own witnesses, as required by *Giglio v. United States*, 405 U.S. 150 (1972). *See Rosales-Martinez v. Palmer*, 753 F.3d 890, 896 (9th Cir. 2014). Malicious prosecution claims under § 1983, too, must wait until the conclusion of criminal proceedings. *See Lanning v. City of Glens Falls*, 908 F.3d 19, 24-29 (2d Cir. 2018). The same goes for claims of intentional infliction of emotional distress based on wrongful convictions. *See Serrano*, 315 F. Supp. 3d at 1043.

Section 1983 plaintiffs often bring fabrication claims alongside one or more of the above claims that accrue post-termination. *See, e.g.*, *McDonough*, 898 F.3d at 264 (alleging evidence fabrication and malicious prosecution); *Halsey v. Pfeiffer*, 750 F.3d 273, 278-79 (3d Cir. 2014) (same); *Cairel v. Alderden*, 821 F.3d 823, 827 (7th Cir. 2016) (alleging evidence fabrication and *Brady* violation); *Massey v. Ojanliit*, 759 F.3d 343, 347 (4th Cir. 2014) (alleging evidence fabrication and false imprisonment); *Jeanty v. City of Utica*, 2017 WL 6408878, at *2 (N.D.N.Y. Aug. 18,

2017) (alleging evidence fabrication and *Giglio* violation); *Serrano*, 315 F. Supp. 3d at 1034, 1042 (alleging evidence fabrication and intentional infliction of emotion distress).

Dissonant accrual rules will force plaintiffs to bring such claims separately, leading to "piecemeal litigation" that wastes the time and resources of litigants and courts alike. *See Panetti v. Quarterman*, 551 U.S. 930, 946 (2007). Such piecemeal litigation also risks the possibility of divergent outcomes on claims arising from the same occurrence, thereby undermining public confidence in the justice system. This Court has long recognized "the desirability of avoiding piecemeal litigation," *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 818 (1976), and can do so here by adopting consistent accrual rules for claims stemming from allegations of government misconduct in criminal prosecutions.

II. Any Rule that Encourages Litigants to File § 1983 Lawsuits During Pending Criminal Proceedings Is Divorced from the Realities of Criminal Litigation

Given the massive liberty interest at stake in criminal cases, a defense attorney would rarely advise his client to file a concurrent § 1983 fabrication-of-evidence claim while the criminal case is ongoing. Parallel litigation threatens to undermine the defendant's Fifth Amendment privileges, inappropriately expand discovery, expose the basis of the defense to the prosecution in advance of criminal trial , or otherwise prejudice the case. *See SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1376 (D.C. Cir. 1980). Yet, a rule that begins running the statute of limitations *during* a pending prosecution would require that criminal defendants in many cases do just that,

or else forfeit their claims. These risks are unnecessary and unfair, and serve no real countervailing state interest. They are also easily avoided by the bright-line rule adopted in the Third, Fifth, Sixth, Ninth, and Tenth Circuits.

A. Filing a § 1983 Claim During a Criminal Prosecution Incentivizes the Prosecutor to Secure a Conviction

Prosecutors understand that a conviction generally *Heck*-bars parallel civil claims and thus shields state officials from potential liability for any conduct during the criminal proceedings. Thus, commencing a § 1983 civil action for fabrication of evidence while a criminal case is still pending would encourage prosecutors to resist dismissals, insist on guilty pleas, and make them less willing to concede that a case lacks strong evidentiary support or merit.

Prosecutors protecting their jurisdictions and law enforcement officers from § 1983 fabrication-of-evidence suits may more forcefully pursue a conviction in the still-ongoing criminal proceeding. That risk is particularly salient in light of prosecutors' immense discretion and the nature of plea bargaining in the modern criminal justice system. Prosecutors are the system's most powerful actors. They have nearly unfettered discretion in making charging decisions, negotiating plea agreements, and dismissing cases. A criminal defendant's position in plea bargaining is naturally precarious given the wide discretion prosecutors may exercise. Thus, the potential risk of less leniency—or bad faith—in the bargaining process is enough to discourage some defendants from filing meritorious § 1983 claims while their criminal case remains pending. Given that plea bargaining is the presumptive path in a crimi-

nal proceeding, an accrues-during-prosecution rule could effectively prevent the vast majority of criminal defendants from ever bringing meritorious § 1983 misconduct cases.

Ideally, prosecutors should not abuse the broad discretion they are afforded, but instead should negotiate in good faith to achieve just and equitable outcomes. But the filing of a parallel civil § 1983 claim injects an inappropriate factor into the many discretionary decisions prosecutors make throughout a criminal case—including those regarding bail recommendations, appropriate charging, plea offers, and trial readiness. It focuses prosecutors on avoiding potential liability for their law-enforcement colleagues and their cities or towns, rather than bargaining in good faith to accomplish a just result. Indeed, in cases with obvious indicia of law enforcement misconduct—for example, a visibly brutalized defendant arraigned on a stand-alone "resisting arrest" charge—many prosecutors in *amici*'s jurisdictions already assume a liability-protective stance from the outset and, knowing civil suit is likely, refuse to dismiss or plea bargain. The mere specter, then, of civil liability, even without the forced filings contemplated by an accrues-during-prosecution rule, introduces an improper factor to criminal dispositions. The deluge of civil filings that would be unleashed by an accrues-during-prosecution rule would introduce this improper factor to thousands of new cases—delaying those criminal proceedings, falsely incentivizing prosecutors to pursue weak cases, and unnecessarily flooding the federal courts with civil claims that are unripe and possibly *Heck*-barred.

B. Because of the Breadth of Civil Discovery, Parallel Civil and Criminal Litigation Harms Defendants

An accrues-during-prosecution rule does not account for the challenge of conducting contemporaneous civil and criminal discovery—a challenge faced by both the government and the defendant.

Civil discovery is extremely broad in scope. It "requires nearly total mutual disclosure of each party's evidence prior to trial." *Afro-Lecon, Inc. v. United States*, 820 F.2d 1198, 1203 (Fed. Cir. 1987). Rule 26 permits broad discovery of "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case ... information within this scope of discovery need not be admissible to be discoverable." Fed. R. Civ. P. 26(b)(1). In contrast, discoverable materials are described with specificity and detail in the criminal context. *See* Fed. R. Crim. P. 16.

One broad divergence between civil and criminal discovery is in the ability to conduct depositions. In the criminal context, a party is permitted to depose only its own witnesses, and only pursuant to a court order in "exceptional circumstances." Fed. R. Crim. P. 15(a). By contrast, civil discovery rules allow depositions of any person whose testimony would be relevant to the subject of the action—including the accused plaintiff. *See* Fed. R. Civ. P. 26. To establish a § 1983 fabrication-of-evidence claim then, accused plaintiffs must effectively give up the right to remain silent and be deposed—inverting the burden of proof—in order to make out a cognizable legal claim. There is no doubt that an accused plaintiff or his witnesses should not be the subject of a civil deposition regarding what they know about purported evi-

dence against him, and how they know it, when the plaintiff is simultaneously facing criminal charges based on the same evidence. An accrues-during-prosecution rule is thus at odds with the structure, goals, and constitutional guarantees of the criminal justice system, placing an accused plaintiff in an unnecessary bind as he navigates civil discovery while defending an open criminal case.

In addition, the government has the power in the civil action to serve interrogatories and requests for admission to the criminal defendant. *See* Fed. R. Civ. P. 33, 36. These requested disclosures may be related to any matter within the broad scope of civil discovery. Under the accrues-during-prosecution rule, criminal defendants would be required to submit written responses to these requests in the civil action while their criminal case remain ongoing. This may include interrogatories specifically seeking the defendant's opinion or contention that relates to a fact relevant in their criminal case. There is no parallel mechanism in the criminal context that would require a defendant to prepare written responses to questions from the government. The ability of the government to seek written disclosures in the civil action is therefore extremely prejudicial to the defendant's criminal case and has obvious implications for the defendant's Fifth Amendment privileges.

The ability to subpoena third parties is also vastly expanded in the civil context. Rule 17 of the Federal Rules of Criminal Procedure, which outlines the use of subpoenas, "was not intended to provide additional means of discovery"; rather, the Rule's "chief innovation was to expedite the trial by providing a time and place before trial for inspection of the sub-

poenaed materials." *Bowman Dairy Co. v. United States*, 341 U.S. 214, 220 (1951). In criminal cases, subpoenas are authorized only if the moving party can show: "(1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general 'fishing expedition.'" *United States v. Nixon*, 418 U.S. 683, 699-700 (1974). In contrast, this heightened showing is not required in the civil context, where subpoena power is far-reaching. *See* Fed. R. Civ. P. 45(a)(1)(A)(iii) (a subpoena may command attendance at a deposition; production of documents, electronically stored information, or tangible things; and inspection of premises).

Under an accrues-during-prosecution rule, wherein a § 1983 claim must be filed before the conclusion of criminal process, the government could use its subpoena powers in the parallel civil action to access confidential, potentially privileged information from third parties that it otherwise would have no ability to retrieve in the criminal case. This could include information such as education records, employment history, and medical records—all of which may have the potential to prejudice the defendant in his ongoing criminal case.

Nothing in the law requires that a court postpone civil discovery or otherwise stay civil proceedings until the termination of the parallel criminal proceeding. *See Mid-America's Process Serv. v. Ellison*, 767

F.2d 684, 687 (10th Cir. 1985) (noting that the trial court exercises discretion in determining whether to postpone discovery). By requiring defendants to institute lawsuits against the very officials procuring evidence to convict them before the termination of ongoing criminal proceedings, an accrues-during-prosecution rule creates a serious risk of governmental discovery abuse.

C. Filing a § 1983 Suit During a Criminal Proceeding Prejudices an Innocent Person's Criminal Defense and His § 1983 Claim

Criminal defendants are severely prejudiced when they must file § 1983 suits during ongoing criminal proceedings.

As an initial matter, they put their own criminal defense at risk. The very filing of a § 1983 complaint requires a criminal defendant to publicly allege facts related to his pending criminal case. To survive a motion to dismiss, a complaint must "contain sufficient factual matter ... to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Filing a complaint that meets the *Iqbal-Twombly* particularity standard may require the waiver of attorney-client, physician, or Fifth Amendment privilege over some information and consequently undermines effective criminal defense representation. It could require an accused to assert specific facts, specific defenses, and specific supporting witnesses before the criminal trial even begins—effectively inverting the Constitution's guarantee that the government must prove its case beyond a reasonable doubt before an accused is expected to put forth his own evidence and witnesses or waive his right to silence. Parallel criminal and

civil cases thus critically endanger a defendant's constitutional trial rights, and criminal defendants who pursue parallel claims will often be put to an impossible choice: testify in the civil case to meet the burden of production and persuasion, or decline to testify to protect their right to say nothing at all and hold the government to its burden of proof in the pending criminal trial.

The criminal defendant who declines to testify in the civil case prejudices the civil claim. A "claim of privilege is not a substitute for relevant evidence," and civil litigants who invoke privilege are still required to meet their evidentiary burdens. *United States v. Rylander*, 460 U.S. 752, 761 (1983). Thus, the government in a civil case may move for summary judgment based on the lack of testimony from the plaintiff and adverse inferences that can be drawn from the invoking of privilege. But the criminal defendant who testifies in the civil case and thus waives his Fifth Amendment silence subjects himself and his witnesses to cross-examination. This prejudices his own criminal defense and may assist the government in unjustly procuring a conviction.

Thus, a civil plaintiff who is also the subject of a criminal prosecution is in a Catch-22: the criminal defendant must make a "choice between being prejudiced in the civil litigation, if the defendant asserts ... her Fifth Amendment privilege, or from being prejudiced in the criminal litigation if ... she waives that privilege." *Louis Vuitton Malletier S.A. v. LY U.S.A., Inc.*, 676 F.3d 83, 97 (2d Cir. 2012); *see United States v. 4003-4005 5th Ave.*, 55 F.3d 78, 83 (2d Cir. 1995). No plaintiff should be required to choose between being effectively compelled to give testimony and being protected from law enforcement miscon-

duct. Such a choice of evils is no choice at all. *Wehling v. Columbia Broad. Sys.*, 608 F.2d 1084, 1089 n.10 (5th Cir. 1979). But an accrues-during-prosecution rule demands just that result.

Even assuming the best case scenario—that the civil litigation is stayed pending the outcome of the criminal prosecution—criminal defendants still suffer. *Amici* themselves have seen prosecutors reference the defendant's stayed civil action during criminal cross-examination, insinuating that the defendant has a motivation to be untruthful while testifying in his criminal case in order to reap the benefit of a monetary award in civil litigation. This creates the harmful suggestion that a defendant's plea of not guilty and subsequent stance at trial is about his potential for financial gain rather than his actual innocence. This characterization of the defendant can then be reinforced in the prosecutor's summation. Not only does this undermine the defendant's substantive right to the presumption of innocence, it also deters him from exercising his constitutional right to testify in his criminal case. Or, in the alternative, it deters him from filing a meritorious § 1983 suit, lest he be labeled a non-credible witness in his criminal case. The prejudice that a defendant experiences by filing parallel civil and criminal cases is therefore not eliminated by a stay in the civil litigation pending the outcome of the criminal trial.

An accrues-during-prosecution rule puts innocent criminal defendants in an unnecessary bind. It is adverse to the principle that court-imposed procedures should not require litigants to surrender one constitutional right in order to assert another. *See Simmons v. United States*, 390 U.S. 377, 393-94 (1968).

III. An Accrues-During-Prosecution Rule Functionally Forecloses Many § 1983 Evidence-Fabrication Claims and Would Have Devastating Consequences

The problems with an accrues-during-prosecution rule are not merely doctrinal or logistical. Evidence fabrication is a serious, systemic problem. An accrues-during-prosecution rule will effectively bar many credible claims of evidence fabrication by innocent defendants aggrieved by intentional, outrageous government misconduct. Without the ability to vindicate these claims, defendants in many cases will be entirely without remedy for their constitutional injuries, and state officials who have used false evidence to put innocent people behind bars will face no real consequences. That sort of injustice will hurt everyone—not just criminal defendants. It will undermine public confidence in the courts and increase the likelihood that citizens will be wrongfully convicted.

A. Evidence Fabrication is a Systemic Problem

Evidence fabrication is far from rare. Perhaps the best known sort of fabrication is police officers lying or stretching the truth on the stand or in documents to obtain a warrant, foreclose pretrial release, prevent the suppression of seized evidence, or secure a conviction. *See* Goldstein, *supra* (investigation revealing more than 25 occasions since January 2015 in which judges or prosecutors found "a key aspect of a New York City police officer's testimony was probably untrue"). Prosecutors, under pressure to obtain convictions, often turn a blind eye to the practice, which provides an advantage that can be "too much ... to resist." Richard A. Rosen, *Disciplinary Sanc-*

tions Against Prosecutors for Brady Violations: A Paper Tiger, 65 N.C. L. Rev. 693, 732 (1987).

Fabrication can take even more brazen forms. In several widely publicized scandals, officers have been caught creating or manipulating physical evidence. *See* Paul Duggan, *"Sheetrock Scandal" Hits Dallas Police; Cases Dropped, Officers Probed After Cocaine "Evidence" Turns Out to be Fake*, Wash. Post, Jan. 18, 2002, at A12 (39 cases in Dallas dismissed when material that police laboratory had initially deemed cocaine was actually ground-up sheetrock); Erwin Chemerinsky, *An Independent Analysis of the Los Angeles Police Department's Board of Inquiry Report on the Rampart Scandal*, 34 Loy. L.A. L. Rev. 545, 549 (2001) (Los Angeles police officers systematically planted evidence and coerced or fabricated witness statements). Officers have also been known to coerce or manufacture confessions, witness testimony, and identifications. *See* Goldstein, *supra* (describing case of officers falsely reporting witness identifications).

Amici have firsthand experience with the human cost of these evils. To take but one example, an attorney at one *amicus* organization represented David Ranta, charged with the 1990 killing of a prominent rabbi. Mr. Ranta maintained his innocence from day one. But, facing a purported eyewitness testifying against him and a typed confession with his signature on it, a jury convicted Mr. Ranta and a judge sentenced him to life imprisonment. Even after a woman came forward in 1995 and explained that her husband, and not Mr. Ranta, had killed the rabbi, Mr. Ranta's efforts to vacate or reverse his conviction were unsuccessful. Sixteen years later, however, another witness came forward and admitted that he committed perjury at the trial and that, before he

picked Mr. Ranta out of a lineup, a detective had told him "to pick the man with the big nose." Mr. Ranta was finally exonerated and released in 2013 after spending 23 years in prison. *See* Frances Robles, *Man Framed by Detective Will Get $6.4 Million From New York City After Serving 23 Years for Murder*, N.Y. Times (Feb. 20, 2014), http://perma.cc/GSC4-Y6Q4.[2]

Shocking individual cases of fabrication are just the tip of the iceberg. Data suggests that a high percentage of wrongful convictions are based at least in part on fabricated evidence. For instance, 102 of the first 362 DNA exonerations documented by The Innocence Project (28%) involved false confessions, a paradigmatic type of fabricated evidence. *DNA Exonerations in the United States*, Innocence Project, https://perma.cc/2BZ2-VUGJ (last visited Nov. 6, 2018). Of the 2,293 exonerations logged in the National Registry of Exonerations, 52% indicate official misconduct as a contributing factor; 57% feature perjury or a false accusation; and 24% involve false or misleading forensic evidence. *Exonerations by Contributing Factor*, Nat'l Registry of Exonerations, http://perma.cc/6WJE-2UBA (last visited Nov. 1, 2018). Misconduct was yet more frequent in murder convictions. *See id.*

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[2] The detective in Mr. Ranta's case, Louis Scarcella, played a role in securing at least fourteen other convictions that have since been vacated, many based on findings or serious accusations of official misconduct. *See Shawn Williams*, Nat'l Registry of Exonerations, http://perma.cc/TYF6-UDHN; Alan Feuer, *Another Brooklyn Murder Conviction Linked to Scarcella Is Reversed*, N.Y. Times (Jan. 11, 2018), http://perma.cc/85SN-HZYN.

And in *amici*'s experience, data gleaned from exonerations underestimates the frequency with which fabricated evidence is used against criminal defendants. It does not account for the many prosecutions that are dropped after fabrication comes to light. Nor does it account for fabricated evidence that is suppressed by a judge or disbelieved by a jury.[3]

B. An Accrues-During-Prosecution Rule Will Functionally Bar Many Meritorious Evidence-Fabrication Claims

Predictably, all of this fabrication gives rise to many viable claims under § 1983. But an accrues-during-prosecution rule will foreclose a large share of these claims. For the reasons described above, defendants who bring fabrication claims during their criminal proceedings could face dismissal under *Heck*. Criminal defendants whose proceedings take longer than the limitations period, but who fail to

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[3] *See, e.g.*, *Gray v. Commonwealth*, 480 S.W.3d 253, 258-59 (Ky. 2016) (vacating murder conviction where defendant's confession was based in part on "forged lab report of DNA evidence linking [the defendant] to the murders"); *State v. Gaston*, 187 So.3d 1008 (La. Ct. App. 2015) (mem.) (affirming suppression of evidence where trial court found that officer had fabricated an inculpatory statement); *People v. Redmond*, 449 N.E.2d 533, 536 (Ill. Ct. App. 1983) (affirming suppression of evidence where warrant affiant "lied or had exhibited a reckless disregard of the truth" about a purported "conversation with a reliable informant"); *People v. Baez*, 661 N.Y.S.2d 759, 764 (N.Y. Sup. Ct. 1997) (suppressing evidence based on finding that officer's story about inculpatory telephone call was "a fabrication made up later to justify earlier unlawful conduct").

sue, will be time-barred before their claims are even ripe.

But even defendants whose criminal proceedings are shorter—and who thus could theoretically bring their claims within the limitations period—will face severe restrictions. Given the typical timelines of criminal proceedings, many criminal defendants may have only months following their criminal trials to file their civil claims. In the Bronx, for example, misdemeanor cases that reached jury verdicts between 2013 and 2017 were, on average, almost thirty months old. *See* Crim. Ct. of the City of N.Y., *Annual Report 2017*, at 49-50 (2018), http://perma.cc/2B34-XXZA. If a defendant in an average Bronx misdemeanor case had a viable fabrication-of-evidence claim accrue around the time of his arrest, at best he would have only six months to find counsel, duly investigate the claim, and file a complaint before the three-year limitations period expired. And that is just for the average misdemeanor—many misdemeanors in the Bronx are more than thirty months old and would therefore be even closer to a time-bar. Proceedings tend to be even longer for more significant charges like serious felonies, where the consequences of fabrication are even greater.

Elsewhere in America, the time constraints could be even more severe. As of 2013, for example, 539 inmates in Cook County Jail had been held for more than two years awaiting trial, and forty had been held for more than five years. *See* David Thomas, *Burke Criticizes Pretrial Jailing, Extended Stays*, Chi. Daily L. Bull., Dec. 11, 2015, http://perma.cc/TKN5-5Q9U.

The rule's practical harshness compounds for claims held by the most vulnerable defendants. For

example, one *amicus* organization has several cases still in pretrial proceedings that have been open for more than three years, and the defendant in each of these cases has mental competency issues. Defendants with issues of mental incompetency are the least capable of filing civil rights claims on their own or finding lawyers to help them. And because of the myriad procedural steps required to evaluate competency, these defendants' cases tend to last the longest. Likewise, serious homicide charges often remain on the courts' dockets for more than three years because homicide cases frequently have no statutory speedy trial requirement. *See, e.g.*, N.Y. Crim. Proc. Law § 30.30(3)(a). Homicide cases are also among the most likely to give rise to fabricated evidence—the evidence is often technical and involves forensics—but a defendant acquitted after the typical homicide trial would likely be time-barred from bringing suit. An accrues-during-prosecution rule thus creates a perfect storm: its harshest effects fall on cases most likely to involve fabricated evidence and where defendants are least likely to be able to promptly file civil claims.

C. In Many Cases, an Evidence-Fabrication Claim Under § 1983 is the Only Effective Form of Redress

An accrues-during-prosecution rule would matter less if there remained other avenues of relief for someone in the petitioner's shoes. But in many cases where officials use false evidence against innocent defendants, fabrication claims are the only adequate form of redress. Other constitutional torts will often be foreclosed or practically useless. If the fabricating official had "probable cause to believe the proceeding [could] succeed"—a notoriously low bar—then the

innocent defendant cannot bring a claim for malicious prosecution. *Posr v. Court Officer Shield No. 207*, 180 F.3d 409, 417 (2d Cir. 1999). False arrest claims, beyond their own doctrinal limitations, generally provide such inconsequential relief that they are often not worth filing, particularly for defendants tried and incarcerated based on fabricated evidence.

Doctrines of immunity stand as additional barriers. Prosecutors have absolute immunity for all conduct undertaken in their capacity as advocates and, as the decision below demonstrates, that immunity covers even the knowing prosecution of charges based on fabricated evidence. *See* Pet. App. 17a-19a. Police officers have qualified immunity if reasonable officers could disagree about whether there was probable cause. *Escalera v. Lunn*, 361 F.3d 737, 743 (2d Cir. 2004). These hurdles do not stand in the way of fabrication claims. *See Ricciuti v. N.Y.C. Trans. Auth.*, 124 F.3d 123, 130 (2d Cir. 1997) (holding that presence of probable cause for an arrest does not immunize officer from evidence-fabrication claim and declining to give officer qualified immunity).

The petitioner's own case shows vividly how these barriers work in practice. The Second Circuit held that the prosecutor had absolute immunity from suit under a malicious prosecution theory. A false arrest claim would have been untimely and, even if legally viable, would provide inconsequential relief given that petitioner was subjected to two trials based on fabricated evidence. The evidence-fabrication claim was thus the petitioner's sole path to real recovery. Many more claims will meet a similar fate under an accrues-during-prosecution rule.

Ultimately, an accrues-during-prosecution rule would deter innocent people with legitimate claims

from filing civil suit by forcing them to choose between aggressively and completely defending themselves from the bad act or demanding a remedy from the bad actor. Or it would cause them to flood the courts with unripe claims to avoid the risks posed by the statute of limitations, wasting the resources of courts and litigants alike. Such a rule would be difficult to administer, inconsistent with precedent, and deeply unjust.

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted,

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